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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFONSO PENAFLOR,

Defendant and Appellant.

E058314

(Super.Ct.No. INF1200978)

OPINION

APPEAL from the Superior Court of Riverside County. Graham Anderson Cribbs, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Barry Carlton, and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

I

STATEMENT OF THE CASE

On July 10, 2012, an information charged defendant and appellant Alfonso Penaflor with residential robbery with a firearm use allegation (Pen. Code,¹ §§ 211, 212.5, subd. (a), 12022.53, subd. (b), 1192.7, subd. (c)(8); count 1); burglary of an inhabited dwelling with non-occupant with firearm use allegations (§§ 459, 667.5, subd. (c)(21); count 2); receiving stolen property (§ 496, subd. (a); count 3); and being a felon and addict in possession of a firearm (§ 29800, subd. (a)(1); count 4). The information also alleged a prior felony conviction as a strike prior (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1); a prior serious felony (§ 667, subd. (a)); and a prior prison term (§ 667.5, subd. (b)). Defendant pleaded not guilty.

On February 1, 2013, a jury trial commenced. The prior conviction allegations were bifurcated and defendant waived his right to a jury trial on those allegations. On February 4, 2013, the jury found defendant guilty of all the charged offenses and found all of the allegations true.

On March 15, 2013, the trial court denied defendant's motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and sentenced him to prison for a total term of 24 years and four months. Defendant filed a notice of appeal on the same day.

¹ All statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendant contends that the trial court's minutes and abstract of judgment should be corrected to conform to the oral pronouncement of judgment. The People agree. Defendant also contends that the trial court erred in denying his *Romero* motion. We agree with the parties that the minutes and abstract of judgment should be corrected. We, however, disagree with defendant and find that the trial court did not abuse its discretion in denying his *Romero* motion.

II

STATEMENT OF FACTS

On May 1, 2012, Christopher Turner lived in a condominium on Landau Boulevard in Cathedral City with his girlfriend and her three children. About 11:00 a.m., Turner was home alone, in his bedroom, talking on his cell phone. He was getting ready to shower when he heard three loud "booms" and then saw a male entering his bedroom through the window. The male wore a hat, a bandana on his face, and black clothing; he carried a semi-automatic handgun.

At first, Turner shut himself inside the adjoining bathroom. Turner then ran out of the home through the garage, grabbing his own handgun on the way, and ran up the back alley. Turner noticed a gold Saturn vehicle in the driveway as he fled. As he ran up the alley, Turner called 911. Turner described the armed intruder, the car, and his flight to the 911 operator.

When Turner reached the end of the alley, he stayed on the phone with the 911 operator and began to walk back to his residence down Landau Boulevard. When he rounded the corner at 30th Street and reached the back of his residence, he saw the

intruder crossing the front yard and walking down the sidewalk. Turner stepped into view and pointed his gun at the intruder; he turned and ran. Turner also turned and ran back up the alley where he awaited the arrival of the police.

Cathedral City Police Officer Brian Barkley responded to the north end of the alley and picked up Turner, who was wearing only boxer shorts, and returned him to his residence. In the side yard, just inside the gate by the garage, Officer Barkley found and photographed four shoeprints leading from the gate to the master bedroom window. The screen for the master bedroom window had been broken off and lay on the ground.

Inside Turner's residence, several items were missing: a laptop computer, two cell phones, a garage door opener, Turner's girlfriend's credit card, a CD case, and a large amount of cash and bills that Turner intended to pay that day.

Officer Dwayne Hodge responded to the intersection of Landau and 30th. He saw a gold Saturn stopped at the eastbound curb line of 30th, a short distance from the intersection. He also saw a black-clad individual running on 30th toward the Saturn vehicle; that individual got into the Saturn's passenger side before the vehicle pulled away. While following the Saturn vehicle, Officer Hodge saw the passenger move up and down as though leaning toward the footboard area. The vehicle stopped short of the next intersection, then turned north of the intersection where police stopped it. The driver, a female, and the passenger, defendant, were taken into custody.

Officer Dane Dickson arrived shortly after the Saturn had been stopped. He searched defendant, who was dressed in all black clothing. Defendant had a garage door opener in one of the front pockets of his pants and a cell phone in the other. Officer

Dickson searched the Saturn and found a black bandana, a dark ball cap, a blue latex glove, and several zip ties on the passenger floorboard. He also found a fully-loaded Ruger nine-millimeter semi-automatic handgun behind a loose panel in the center console on the passenger side. In the glove compartment, Officer Dickson found another cell phone and a credit card in the name of Turner's girlfriend. Behind the driver's seat, Officer Dickson found a laptop computer that was later returned to Turner, additional zip ties, a zip tie package, and a sales receipt for a package of zip ties from Home Depot. Two of the zip ties were looped together facilitating their use as handcuffs.

At the corner of 30th Street and La Paz, the first intersection east of Turner's residence, Officer Lawrence Sanfillippo found a second blue latex glove in the gutter. Both latex gloves were in a similar, balled-up condition. Officer Sanfillippo took the garage door opener found in defendant's pocket to the Turner residence; it opened and closed Turner's garage door.

Officer Barkley compared defendant's shoes with the shoe prints in Turner's yard and found matching size and sole print patterns.

Defendant testified that his girlfriend, Carina Munoz, came to his residence about 10:00 a.m. and they left to run errands. Munoz drove the Saturn, which belonged to defendant's father. They went to Home Depot where defendant bought zip ties in order to bind electrical cords together. He looped some ties together to use with Munoz during kinky sex.

By about 11:00 a.m., they were on 30th Street, on their way to pick up Munoz's son, when they saw a man hurrying down the street, and carrying and dropping items before turning the corner at Whispering Palms Trail. Defendant had Munoz stop the car; he then collected the dropped items and took them to the Saturn vehicle. He left some items in his pockets, put some in the glove box, dropped some on the floor of the vehicle, put the laptop in the back seat, and began examining the gun. He found no cash. As Munoz drove away, defendant realized they were being followed by the police and he hid the gun in the center console.

Defendant said that the two cell phones recovered by the police belonged to him and Munoz. He denied being in Turner's yard and denied that the Saturn was ever in the driveway of Turner's residence.

III

ANALYSIS

A. The Sentencing Minutes and Abstract of Judgment Should Be Corrected

In this case, in the oral pronouncement of judgment, the court imposed no enhancement term on the prior prison term allegation. The minutes and abstract of judgment, however, show an imposed and stayed term. Defendant contends that the trial court erred in imposing a five-year term based on defendant's prior serious felony conviction, and imposing and staying a one-year term based on the prison term defendant served on the same conviction. The People agree.

In *People v. Jones* (1993) 5 Cal.4th 1142, the California Supreme Court decided, as a matter of statutory interpretation, that enhancements under both section 667, subdivision (a), and section 667.5, subdivision (b), could not be imposed when based on the same prior conviction. (*Id.* at pp. 1149-1153.) Because the defendant had received enhancement terms under both statutory provisions for the same prior conviction, the trial court was ordered to strike the one-year term imposed under section 667.5, subdivision (b), and to amend the abstract of judgment accordingly. (*Id.* at pp. 1145-1146, 1149-1153.)

Here, the serious felony and prior prison term enhancements alleged and found true were both based on the same prior conviction.

In its tentative sentencing, the trial court proposed to follow the recommendation of the probation report and impose terms for both enhancements. The prosecutor, however, stated that only one of the enhancements could be imposed. When imposing defendant's actual sentence, the trial court only imposed the five-year term for the serious felony prior. However, the minutes indicate that in addition to the five-year term, a one-year term was imposed and stayed, and the abstract of judgment indicates that the prior prison term was stayed. These entries are in error and conflict with the trial court's oral pronouncement; we hereby order them corrected. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) The trial court shall strike the imposed and stayed one-year term for the prior prison term in the minutes and abstract of judgment.

B. The Trial Court Properly Denied Defendant's Romero Motion

Defendant contends that the trial court erred in refusing to strike his prior strike in order to relieve him of sentencing as a second strike offender. He contends that a fair consideration of the pertinent factors required striking the prior strike. We discern no abuse of discretion in the trial court's ruling.

As part of the sentencing proceeding, defense counsel asked the trial court to strike defendant's prior strike conviction. In opposition, the prosecutor referred to her sentencing brief in which she described the circumstances of defendant's prior robbery conviction:

"In INF058507, defendant committed a home invasion robbery in concert with two other men. The defendants in that case broke into a home and zip tied the victim to a chair. They beat and electrically shocked the victim with a tazer attempting to obtain information on the whereabouts of a female that had escaped confinement by one of the defendants. [Defendant's] accomplice in that case ultimately killed a different victim while trying to find the same woman. [Defendant] was convicted of P.C.211, Robbery as part of a plea agreement in an effort to separate him from the co-defendant's murder trial. The defendant was sentenced to 5 years in prison."²

The prosecutor also pointed out that defendant was on parole when he committed the current offenses.

² The probation officer's report repeats the prosecutor's factual account of the prior crime.

In addition to the prosecutor's pleading and argument, the trial court also read and considered the probation officer's report.

The court denied defendant's *Romero* motion, stating:

"Counsel, based upon the information that I have before me and based upon the arguments that were made with regard to the striking of the strike that [defendant] suffered in 2009, the nature of the crime being a violent felony, a robbery, 211, is respectfully denied."

In *Romero*, the Supreme Court held that a trial court has the discretion to dismiss three-strike-prior-felony-conviction allegations under section 1385. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) However, the court cautioned, while a trial court's power to dismiss an action under section 1385 is broad, it is not unlimited and is subject to review for abuse of discretion. (*Id.* at p. 530; *People v. Carmony* (2004) 33 Cal.4th 367, 375.) We will not find an abuse of discretion unless the trial court's decision is "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, at p. 377.) It is the defendant's burden as the party attacking the sentencing decision to show that it was arbitrary or irrational and, absent such showing, there is a presumption that the court ""acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."" [Citations.] (*Ibid.*)

The touchstone of the analysis is ""whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as

though he had not previously been convicted of one or more serious and/or violent felonies.’ [Citation.]” (*People v. Carmony, supra*, 33 Cal.4th at p. 377.)

In this case, it is apparent that the trial court was aware of its discretion to strike the prior strike and that it did not consider any impermissible factors. Moreover, defendant clearly comes within the statutory provisions for a second strike offender. Therefore, the burden is on defendant to demonstrate that the trial court’s refusal amounted to an arbitrary, capricious or patently absurd result under the specific facts of this case.

In this case, in 2009, at age 22, defendant was convicted of robbery by a plea bargain arising out of his participation with two others in a home invasion robbery in which the victim was zip-tied, beaten, and shocked with a tazer. Defendant obtained that plea bargain to separate his case from an accomplice who had killed another victim. Defendant was sentenced to state prison for five years. Defendant was released from prison on October 14, 2011.

Little more than six months after his release on parole, defendant, with the assistance of his girlfriend, committed another residential robbery. He acted with an accomplice in both crimes and used or intended to use zip ties in both crimes. However, in this case, defendant armed himself with a fully-loaded, semi-automatic handgun, demonstrating a significantly increased danger to life. In fact, in light of Turner’s testimony that he was talking on the phone in the bedroom and the bedroom window was open, it is reasonable to conclude that defendant knew that the residence was occupied when he broke in. Moreover, defendant accepted no responsibility for the robbery.

Notwithstanding his dangerous criminal behavior, defendant points to his GED, apparently earned while in custody awaiting trial in the earlier case, as “progress toward rehabilitation;” his drug use and efforts “to overcome his drug dependency;” and his denial of gang membership, as factors weighing in favor of granting his *Romero* motion. Although earning a GED is laudable, defendant turned his back on that effort when he repeated his crime in a more dangerous manner. Furthermore, defendant denied any drug problem; he was forced to attend Narcotics Anonymous meetings only when he tested positive for drugs during parole. In light of his denial of any responsibility for his crimes, his denial of gang membership has no impact in this case.

In sum, there is no indication from the record here that the trial court failed to consider the relevant factors, that it failed to properly balance the relevant factors, or that it abused its discretion in determining that defendant was not outside the spirit of the three strikes law. (*People v. Carmony, supra*, 33 Cal.4th at pp. 375, 377-378.) Therefore, we cannot say that the trial court abused its discretion when it declined to dismiss defendant’s prior conviction.

IV
DISPOSITION

The trial court is ordered to strike the imposed and stayed one-year term based on defendant's prison term in the minutes and abstract of judgment, and to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.